No.

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER and ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Illinois Supreme Court, entered in the above case on March 30, 1972.

OPINION BELOW.

The judgment of the Illinois Supreme Court, is reported at 51 Ill. 2d 113, 281 N.E. 2d 310, (1972), and is set out in full as an appendix to this petition.

JURISDICTION.

This petition is presented for review of the judgment of the Illinois Supreme Court entered March 30, 1972. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 United States Code Section 1257.

QUESTIONS PRESENTED.

1. Whether the conviction in this case violated the due process clause of the Fourteenth Amendment in that the defendants could not reasonably know the charge for which they were arrested and the City did not establish the elements of the offense with which the defendants were charged and convicted.

2. Whether the Chicago Municipal Ordinance on disorderly conduct as construed by the Illinois Supreme Court violates the First, Fourth and Fourteenth Amendments to the Constitution of the United States because:

   a. as construed by the Illinois Supreme Court, the ordinance permits peace officers to disperse lawful and peaceful assemblies on the sole judgment of the peace officers regarding the state of community unrest.

   b. as construed by the Illinois Supreme Court, the statute permits peace officers without warrant to prohibit lawful and peaceful passage of citizens on the city streets.

3. Whether a citizen may be arrested and convicted solely for the act of peaceably crossing a line imposed without warrant or authority by police and National Guard officials.

4. Whether a citizen who is arrested for proceeding south when ordered not to do so by police officers can be convicted of charge of failure to obey a lawful order to disperse.

5. Whether the ordinance of the City of Chicago violates the due process clause of the Fourteenth Amendment in that it is vague and over-broad on its face.

6. Whether an ordinance of the City of Chicago requiring dispersal under circumstances where three or more persons are engaged in disorderly conduct can be used to prohibit a peaceful march of peaceful defendants in the exercise of the Constitutional First Amendment rights of the defendants.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 193-1(d) of the Municipal Code of the City of Chicago Chapter 193:

> "A person commits disorderly conduct when he knowingly:
>
> • • • • •
>
> d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; . . ."

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

United States Constitution, Fourteenth Amndment:

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Although the trial court record contains 6,000 pages, the essential facts of the case are set forth in the Illinois Supreme Court Opinion.

The occurrence arose out of the Democratic National Convention in Chicago during August 1968. On August 29, 1968 General Richard T. Dunn of the Illinois National Guard gave Dick Gregory, a civil rights leader and celebrity, permission to march a group of demonstrators from the Hilton Hotel at approximately 700 South Michigan Avenue to the corner of 18th and Michigan, a distance of approximately 10 blocks. The demonstrators wished to march to the International Amphitheatre where the convention was being held, a distance of approximately 4 miles from 18th and Michigan. When the march reached 18th and Michigan, the demonstrators found, in the words of the Illinois Supreme Court, "Michigan Avenue had been barricaded with jeeps and barbed wire and there was a line of National Guardsmen, in full battle regalia, positioned diagonally from the northeast corner to the southwest corner of the intersection. Behind the guardsmen to the south, were police, and the testimony shows there were approximately 1,250 National Guardsmen and

120 policemen in the area." The march from the Hilton Hotel to the intersection of 18th and Michigan had been orderly and free of violence. The marchers were told that they could turn west on 18th Street or go back north, but that they would be arrested if they proceeded south. A number of persons, including some of the defendants discussed with the National Guard Officer and police officers in command, the right to continue their march south individually, or as a group. In the course of these discussions, Deputy Police Superintendent Rochford, the highest-ranking law enforcement official at the scene advised Dick Gregory that he would provide an alternate route for the marchers to go to the Amphitheatre, a route which would have taken them out of the city and to the suburbs and back into the convention area, to arrive the following day when the convention had terminated. (R. 1994-5, 5465, 5471.)

The circumstances of the arrest of the individual defendants vary. However, they are adequately summarized in the Opinion of the Illinois Supreme Court, 281 N.E. 2d at 313. As stated in the Opinion, the arrests began after approximately 45 minutes of discussions with the leaders of the group. The Guard line then formed a corridor and permitted persons who wished to proceed south where they were arrested by the police and placed in a police van. "In a period of approximately one hour, 90 to 100 individuals, including all of the defendants, were arrested. Very shortly thereafter an announcement was made that there would be no further arrests, and the arrest corridor was closed off. About 15 or 20 minutes after the arrests were concluded, the marchers surged forward. The Guard line pushed the demonstrators back and released tear gas. The marchers dispersed and returned to Grant Park."

Five of the arrested defendants, Peter Weiss, Murray Kempton, Richard J. Neuhaus, Jane Buchenholz and Georgianna Cestero were delegates or alternate delegates to the Democratic National Convention from New York. The Illinois Supreme Court Opinion, which is appended hereto, discusses the arrests of defendants Neuhaus, Weiss and Kempton separately. As stated in the Illinois Supreme Court Opinion, defendant Weiss took the position that he was arrested merely for the act of walking in a southerly direction through the Illinois National Guard line in an effort to proceed to the convention being held at the International Amphitheatre. From the statement of the facts by the Illinois Supreme Court, it is obvious that once he crossed the Guard line, he was alone as no other marchers were permitted to proceed beyond the Guard line. However, the Illinois Supreme Court rejected this argument on the ground that it "violate[d] the lawful order not to proceed south on 18th Street." 238 N.E. 2d at 316.

After the arrest, all of the defendants, except Kempton and Franklin Miller were charged first under the Chicago Municipal Code, sub-section 193-1(d), the ordinance here in question. The complaints for these defendants were later amended on their face to charge a violation of subsection 193-1(a).[1] Later, second amended complaints were filed prior to the trial, once again charging all of the de-

[1] The total text of the Chicago Municipal Ordinance 193 set forth in Appendix B. The section pertinent here reads as follows:

"A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace;

. . ."

fendants under sub-section 193-1(d) the charges on which the defendants were convicted. In addition, defendants Kempton, Cestero, Ellen Miller, Buchenholz, Robinson and Borden were charged under section 11-33 of the Municipal Code of the City of Chicago.[2] These charges were all dropped prior to trial.

During the course of the trial, motions were made to dismiss the charge under 193-1(d) for the reason that said Ordinance was unconstitutional for overbreadth under the First and Fourteenth Amendments to the United States Constitution (C6, C135, C237, C265, C303, C327, C484). These motions were denied before Trial (C173). After finding of guilty by the trial court, defendants Weiss and Neuhaus were each fined $400.00; defendant Kempton $250.00; and each of the other defendants $200.00 and costs were assessed against all of the defendants. An appeal was taken directly to the Illinois Supreme Court for the reason that the Municipal Ordinance, Section 193-1(d) is unconstitutional under the First and Fourteenth Amendments to the U. S. Constitution as applied and unconstitutionally vague and over-broad on its face. The Supreme Court opinion affirming the judgment of the trial court issued March 30, 1972 is appended hereto. No petition for rehearing was filed.

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[2] "11-33(a) Any person who knowingly shall resist or obstruct the performance by one known to the person to be a peace officer of any authorized act within his official capacity or shall knowingly interfere or prevent a peace officer from discharging his duty as such officer and whoever shall in any manner knowingly assist any person in the custody of any member of the police department to escape or attempt to escape from such custody, shall be fined not less than $25.00 nor more than $500.00.

(b) For the purposes of this section 'resist' shall mean passive as well as active resistance."

ARGUMENT

THE EVIDENCE DOES NOT SUPPORT DEFENDANTS' CONVICTION.

It is clear from the facts that the defendants were not arrested for failing to obey a lawful order of dispersal under circumstances where three or more persons were committing acts of disorderly conduct in the immediate vicinity. First, there is a serious question as to whether any order of dispersal was given. The order given was not to proceed south. From the facts, it is also clear that the arrests were made solely for reason that defendants removed themselves from the demonstration and proceeded south. By proceeding south defendants were in the act of dispersing because the marchers were not allowed to follow them. Although the Illinois Supreme Court states that the order not to proceed south was "reasonable" and that "the clear intent of this order was that the march *would be dispersed* if and as it attempted to move south. . . ." (emphasis supplied) not even such construction can render the order an order of dispersal within the common meaning of the term. Secondly, the Supreme Court Opinion demonstrates that at the time the order of dispersal was given, "the march continued to be peaceful and orderly." (281 N.E. 2d at 314). Therefore, the necessary element of three of more persons creating a disturbance is missing. Finally, the marchers stayed in the intersection for at least 45 minutes without moving. The only people arrested were those who were leaving the demonstration (i.e. dispersing) by going through the Guard line to the south. The decision of the Illinois Supreme Court upholding the conviction is thus in conflict

with this Court's reversal of the Illinois Supreme Court in *Gregory* v. *City of Chicago*, 394 U.S. Ill. 89 S.Ct. 946 (1969). As in *Gregory* the defendants here were arrested for a reason totally different from the offense for which they were charged and convicted. The cases cited in *Gregory*, namely *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960) and *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 251 (1961) required the reversal here.

THE DEFENDANTS WERE ENGAGED IN FIRST AMENDMENT ACTIVITY AND THEREFORE SHOULD BE PROTECTED FROM ARBITRARY ARRESTS.

The fact situation in this case is reminiscent of *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 938, (1969) where this Court struck down a Birmingham ordinance which conferred upon the City Commission "virtually unbridled and absolute power to prohibit any parade, procession or demonstration on the city streets or public ways." Here, we have a blockade of the city streets by the National Guard and police without any authority or warrant whatsoever. Clearly, if a legislative body cannot have such unbridled authority, no administrative or executive power can. Yet, this authority is blatantly asserted by the police and National Guard officials and the defendants are arrested and convicted on a totally unrelated ordinance for disorderly conduct. In *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S.Ct. 680 (1963) it was held that a conviction based on a mere exercise of First Amendment rights to freedom of expression could not stand, even if the evidence adduced at the trial supported the conviction under the statute as construed by the highest Court of the state. As in the *Edwards* case, the defen-

dants here were peaceably exercising their constitutional rights to petition their government for redress of grievances. *See also Cox* v. *Louisiana*, 379 U.S. 536, 85 S.Ct. 453 (1965).

Nowhere in the record has the city ever attempted to establish the legal basis for stopping the march. There was no such legal basis. Therefore, there was no authority on the part of the National Guardsmen or police officers to stop the march. In *Wright* v. *State of Georgia*, 373 U.S. 284, 291-2, 83 S.Ct. 1240, 1245 (1963), the defendants were arrested and convicted of failing to obey the command of a police officer which the State argued "constitutes a traditional form of breach of the peace." This Court answered "[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."

Likewise, in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211 (1965), this Court held that an ordinance which purports to make it unlawful for any person to stand or loiter upon any street or sidewalk, after having been requested to move on by a police officer, would be unconstitutionally over-broad unless limited by narrow construction. In the *Shuttlesworth* case this Court accepted the narrowing construction of the Alabama court of its ordinance. However, in the instant case, the Illinois Supreme Court has expanded rather than narrowed the construction of the disorderly statute and permitted the narrowly constructed statute to be used in a virtually unfettered manner by police officers desiring to terminate peaceful demonstrations.

The Fourth Amendment to the Constitution also protects defendants from such arbitrary arrests. See *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 1397 (1969).

SECTION 193-1(d) IS UNCONSTITUTIONALLY VAGUE AND OVER-BROAD ON ITS FACE

The entire Chapter 193-1 Municipal Code is attached as an appendix to this petition. In order to understand the charge of overbreadth, the entire ordinance must be read in context. It is clear that Sections c and d of the ordinance were designed to evade the impact of this Court's opinion in *Gregory* v. *City of Chicago,* 394 U.S. 111, 89 S.Ct. 946 (1969).

Read by itself, Section 193-1(d) vests virtually unlimited discretion in police officers as to when Constitutionally protected activity can be terminated. This is the result obtained in this case.

The Illinois Supreme Court has previously considered the constitutionality of Section 193-1(d) in *City of Chicago* v. *Greene,* 47 Ill. 2d 30, 264 N.E. 2d 163 (1970) cert. den. 402 U.S. 996, 91 S.Ct. 2180 (1971). *City of Chicago* v. *Fort,* 46 Ill. 2d 12, 262 N.E. 2d 473 (1970). *City of Chicago* v. *Jacobs,* 46 Ill. 2d 214, 263 N.E. 2d 41 (1970). However, this is the first case in which the defendants were merely engaged in First Amendment activities. It is clear from the recent opinion of this Court in *Colten* v. *Commonwealth of Kentucky,* 40 LW 4703, 4705 (1972), that a distinction must be made between situations where the defendant is engaged in First Amendment activities and other situations. In this case, the defendants were indisputably engaged in First Amendment activities. Under circumstances similar to this case this court held a Louisiana statute unconstitutionally overbroad. *Cox* v. *Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 459 (1965).

Section 193-1(d) as interpreted by the Illinois Supreme Court in this case, permits an arrest of a peaceful demon-

strator when other persons in the vicinity are creating a disturbance, such as occurred in the *Gregory* case. It is clear from the Court's opinion in the instant case, that none of the defendants were engaged in a disturbance, nor at the time of the order of dispersal were any of the marchers engaged in disorderly conduct as that term is normally defined. If allowed to stand Illinois peace officers will have unlimited discretion to terminate or prohibit First Amendment expression, an authority which would not be permitted a legislative body. See *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 89 S.Ct. 935 (1969).

Furthermore, as definitively construed by the Illinois Supreme Court, the law is so broad and general that a person of common understanding would be incapable of recognizing when a violation occurred. This kind of overbreadth is prohibited under the doctrine of this Court established in *Ashton* v. *Kentucky,* 384 U.S. 195, 86 S. Ct. 1407 (1966) and *Coates* v. *City of Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686 (1971).

CONCLUSION.

For the above reasons, this Court should grant the petition for certiorari and declare the convictions of the defendants herein as violative of the First, Fourth and Fourteenth Amendments of the United States Constitution and Section 193-1(d) of the City of Chicago Municipal Code to be unconstitutionally overbroad.

Respectfully submitted,

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APPENDIX A

Docket No. 42487 — Agenda 33 — November, 1971

The City of Chicago v. *Peter Weiss*

GOLDENHERSH, Justice.

Defendants, Peter Weiss, Richard J. Neuhaus, James Murray Kempton, Jane Buchenholz, Patricia Saltonstall, Georgianna Cestro, Andrew Robinson, Davis Borden, Ellen Miller, Ellis Boal, Franklin Miller, Sema Lederman and Rose Brooks, appeal from the judgments of the circuit court of Cook County finding them guilty, following a bench trial, of disorderly conduct in violation of section 193-1 of the Municipal Code of the City of Chicago. Defendants Weiss and Neuhaus were each fined $400; defendant Kempton, $250; and each of the other defendants, $200. Costs were assessed against each defendant.

Section 193-1, in pertinent part, provides: "A person commits disorderly conduct when he knowingly: * * * (d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm * *."

The Democratic National Convention was held in Chicago during the last week of August, 1968, and the occurrence out of which these cases arose took place on the evening of August 29, 1968.

The leaders of various dissident groups had announced earlier that protesters would disrupt the convention and the city. Leaders of two dissident groups, the Youth International Party (Yippies), and the National Mobilization Committee to end the war in Viet Nam (MOB), met with representatives of the mayor's offiice concerning the use of public facilities during the week of the convention. It was agreed that the public facilities of the city were

to be made available to members of the Yippies and MOB, so long as they were used in a peaceful and orderly manner, but the city refused to approve their plans to sleep in the parks for the reason that park ordinances of long standing prohibited use of the parks after 11:00 P.M. The city also refused to approve their plans for demonstrations in the area immediately adjacent to the International Amphitheatre, the site of the convention, because a mass assembly of people might interfere with the security preparations of both Federal and local authorities.

MOB, Rennie Davis, Tom Hayden, Mark Simons, Mary Lou Nowka, Marie Zelex and Linda Turner filed an action in the United States District Court for the Northern District of Illinois seeking an injunction to prohibit the officials of the city and park district from interfering with the meetings, parades and demonstrations they planned, and from interfering with their members who intended to sleep in the parks. The plaintiffs argued that they had a right to conduct a massive demonstration within "eyeshot" of the Amphitheatre on the evening of the nominations by the Democratic National Convention, and the defendant local authorities contended that the proposed sites could not be made available because of traffic and security considerations in that area. The district court held that alternative routes of march and assembly suggested by the local officials showed that they had acted in a reasonable and nondiscriminatory manner to preserve public safety and convenience at the site of the convention without depriving plaintiffs and other protesters of their rights of free speech and public assembly. The court also held that the plaintiffs did not have a right to sleep in the parks.

There were numerous demonstrations and marches by various groups from Sunday, August 25, through Thursday, August 29. These marches and demonstrations, which took place in and around the downtown area of the city, several miles north and east of the Amphitheatre, produced a number of confrontations with the police. The protesters

made several attempts to march to the Amphitheatre, and to sleep in the parks. Violent confrontations were experienced on the evenings of August 25, 26, and 27, when the police cleared Lincoln Park of persons who wanted to sleep there. About 8:00 P.M. on Wednesday, August 28, a violent and much publicized confrontation occurred in front of the Conrad Hilton Hotel. On the night of August 28, 1968, following adjournment of the Democratic Convention until the next day, 5 of the defendants attended a meeting at the Amphitheatre at which the participants agreed to assemble the next evening in front of the Conrad Hilton Hotel to protest occurrences, particularly alleged acts of police brutality, which took place during that day.

About 2:00 P.M. on August 29, a large group began to assemble in Grant Park across from the Hilton Hotel. This group was addressed by a number of speakers, including Senator Eugene McCarthy, Dick Gregory, Reverend Ralph Abernathy, Reverend Andrew Young, and Pierre Salinger. About 4:00 P.M. some 2,000 of the group began to march from Grant Park to the Amphitheatre. About 4:30 P.M. the police stopped the march at 16th Street and Michigan Avenue. Deputy Superintendent of Police James Rochford told the marchers that the Secret Service was seriously concerned about the safety of the candidates and asked the demonstrators to return to the Grank Park area where they could demonstrate "to their heart's content."

Most of the group returned to Grant Park. A small part of the group, approximately 30 in number, proceeded south into a Negro residential neighborhood. Several squad cars accompanied this group. The residents of the area were heckling the group, and at 31st Street the police walked with the marchers. Some of the marchers began to fall out of the march, and when the group reached 41st Street about 6:00 P.M. there was a brief scuffle with some Negro youths. These remaining marchers accepted a police offer of escort out of the area.

In the meantime the main group had returned to, and was still assembled in, Grant Park. At approximately 6:30 P.M., General Richard T. Dunn, the commanding officer of the Illinois National Guard, met with Dick Gregory in front of the Hilton Hotel. He told Gregory that 18th Street had been selected as the point beyond which it was not safe for the demonstrators to proceed and that the demonstrators could march as a group anywhere in the area bounded by 18th Street on the south and State Street on the west. Gregory said he would lead the march south on Michigan Avenue to 18th Street. General Dunn said he would meet with representatives of the city, the Secret Service, and the United States District Attorney's office at 18th Street and Michigan Avenue and decide if the march could proceed further.

At approximately 7:20 P.M., approximately 3,000 marchers started south on Michigan Avenue. They marched 3 and 4 abreast on the east sidewalk. About 450 National Guardsmen walked in the street next to them. The marchers stayed on the sidewalk, and as they proceeded south there was some chanting and a few vulgar remarks but no violence. The group reached the intersection of 18th and Michigan at approximately 8:30 P.M. There Michigan Avenue had been barricaded with jeeps and barbed wire, and there was a line of National Guardsmen, in full battle regalia, positioned diagonally from the northeast corner to the southwest corner of the intersection. Behind the Guardsmen to the south were police, and the testimony shows there were approximately 1,250 National Guardsmen and 120 policemen in the area. North of the intersection was a television van equipped with spotlights. As the march was halted at the intersection, the marchers "bunched up" and filled the street.

The marchers were told that they could turn west on 18th Street or go north, but that they would be arrested if they proceeded south. There was considerable discussion between Guard and police officers and leaders of the march, but a stalemate occurred as the marchers refused to go

any direction but south, and the National Guard refused to permit them to go south. This situation continued for about 45 minutes to an hour and tensions began to build. Then the arrests began. Any marchers proceeding south were permitted to go through a corridor in the Guard line where they were arrested by the police and placed in a police van. In a period of approximately one hour, 90 to 100 individuals, including all of the defendants, were arrested. Very shortly thereafter an announcement was made that there would be no further arrests, and the arrest corridor was closed off. About 15 or 20 minutes after the arrests were concluded, the marchers surged forward. The Guard line pushed the demonstrators back and released tear gas. The marchers dispersed and returned to Grant Park.

[1] As grounds for reversal, defendants contend first that section 193-1(d) of the Municipal Code of Chicago is unconstitutionally vague and overbroad on its face. They acknowledge that in City of Chicago v. Fort (1970), 46 Ill.2d 12, 262 N.E.2d 473; City of Chicago v. Jacobs (1970), 46 Ill.2d 214, 263 N.E.2d 47, and City of Chicago v. Greene (1970), 47 Ill.2d 30, 264 N.E.2d 163, cert. denied (1971), 402 U.S. 996, 91 S.Ct. 2180, 29 L.Ed.2d 162, this court considered and rejected the contentions here presented, but argue that Coates v. City of Cincinnati (1971), 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed. 2d 214, decided subsequent to *Greene,* requires reconsideration and reversal of our prior holdings.

The ordinance in *Coates,* insofar as here relevant provides: "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." 402 U.S. 611, n. 1, 91 S.Ct. 1686, 1687, 29 L.Ed.2d 214, 216.

The Court in holding the ordinance so vague as to be invalid said: "Thus, the ordinance is vague not in the

sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." (402 U.S. 611, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214, 217.) In our opinion the ordinances are clearly distinguishable, and we adhere to our decision in City of Chicago v. Fort (1970), 46 Ill.2d 12, at page 16, 262 N.E.2d 473, at page 476, wherein we said, "* * * the ordinance defines boundaries sufficiently distinct for us to review the reasonableness of the peace officer's on-the-spot decision that three or more people in the immediate vicinity were engaged in acts of disorderly conduct."

Defendant's principal contention is that assuming, *arguendo*, that the ordinance is constitutional on its face, the manner in which it was applied to these defendants renders it unconstitutional. They argue that the order was not one of dispersal within the contemplation of the ordinance, for the reason that, although it prohibited their going to the south, it did not order them to disperse. They argue further that the order was unlawful for the reason that when given they were peacefully engaged in the exercise of their constitutional rights, there was then present no element of violence or disorderly conduct, and that whether the order was lawful must be determined as of the time they were barred from marching south and cannot be decided on the basis of disorderly conduct by other persons subsequent to the allegedly unlawful interference with their march to the Amphitheatre. They contend that although the ordinance might possibly be constitutionally applied to "non-speech" activities it cannot survive scrutiny under first amendment tests, and they state, correctly, that because a claim of a constitutionally protected right is involved, this court may not apply to the findings of the trial court the same tests as are used in other cases, but must itself examine the whole record. (Cox v. Louisiana, 379 U.S. 536, 545, 85 S.Ct. 453, 459, 13 L.Ed.2d 471, 478-479.) We note, parenthetically, that the record is 6,000 pages in length.

It is the city's position that the lawfulness of the order not to proceed south is not an issue in the case. The city argues that even if the order were not lawful, the arrests of the defendants were proper and the convictions must be affirmed because the evidence shows that at the time of the arrests there is no question that disorderly conduct as defined by paragraph (a) of section 193-1 was committed, and in fact, a great deal of violence was then in progress. Alternatively plaintiff argues that the order, when originally given, was lawful.

[2] The first question to be determined is whether the order not to proceed south of 18th Street was an order of dispersal under section 193-1(d). It is apparent from the record that the police and National Guard gave no order, and made no attempt, to completely disperse the march when it reached the intersection. The demonstrators were free to continue their march west or return north. The order not to proceed south was given on numerous occasions over a bull horn and the demonstrators were fully advised that they would be arrested if they did proceed south. The clear intent of this order was that the march would be dispersed if, and as, it attempted to move south, and it was an order of dispersal within the meaning of section 193-1(d).

[3] The next issue to be determined is whether the order not to proceed south was "lawful" as required by section 193-1(d). The lawfulness of the order must be determined as of the time when it was given, when, admittedly, the march continued to be peaceful and orderly, and if unlawful at that time it cannot be rendered lawful by the violence which followed the refusal to permit the march to proceed south of 18th Street.

As stated by the Supreme Court in Cox v. Louisiana, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2 471, 483, the contention presented "raises an issue with which this Court has dealt in many decisions, that is, the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience

of the people in their use and the concomitant right of the people of free speech and assembly."

The court went on to say, "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." (379 U.S. 536, at 554, 85 S.Ct. 453, at 464, 13 L.Ed.2d 471, at 484.) "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (379 U.S. 536, at 555, 85 S.Ct. 453, at 464, 13 L.Ed.2d 471, at 484.) "We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." Cox v. Louisiana, 379 U.S. 559, at 574, 85 S.Ct. 476, at 486, 13 L.Ed.2d 487, at 498.

[4] As required by Cox, we have examined the entire record and conclude that the order not to proceed south of 18th Street was lawful when given. The record reflects numerous outbreaks of violence in various parts of the city, and the testimony of Deputy Superintendent of Police Rochford persuades us that there was a reasonable basis for the fear that a march of 3,000 demonstrators which presented no immediate threat of violence in the industrial area which lay north of 18th Street might, if permitted to move into a densely populated area in which

violence had recently occurred, present a serious threat to the peace and safety of the community. Further we find the testimony of Commanders James Riordan and Robert Harness of the Chicago Police Department and General Dunn of the National Guard supportive of Deputy Superintendent Rochford's opinion that permitting the march to proceed south of 18th Street would present a threat to the peace and security of the area.

[5] We are cognizant of defendants' contention that with 1,250 Guardsmen and 120 police immediately available, any difficulty which arose could be controlled. We recognize that the police may not stop a peaceful demonstration merely because a hostile crowd which does not agreed with the views of the demonstrators threatens violence and, in fact, owe a duty to protect the peaceful individuals from acts of hostility. There are circumstances, however, when the first amendment right to assemble and demonstrate in a specific place or area must yield to the compelling interest of the community to maintain peace and order. In our opinion, against the background of what had already occurred and the potential danger of permitting the march to proceed, the order given was reasonable, and we hold that within the meaning of the ordinance it was a lawful order.

The record shows that the order prohibiting the marchers to proceed south of 18th Street was announced by a National Guard officer standing on a truck and using a bull horn. He announced, repeatedly, that the procession could go west or north but would not be permitted to go south. Approximately 10 minutes after the first announcement, Dick Gregory came out of the line of marchers and spoke with Deputy Superintendent Rochford. He told Rochford that the group wanted to march to the Amphitheatre, and Rochford replied that he was concerned that violence might erupt in the area into which they desired to march. Gregory stated that he wanted to take the group to his home for a meeting, and Rochford offered to escort any reasonable number of people to Gregory's home. Gregory

rejoined the marchers and shortly threafter returned and told Rochford they were going to march to the Amphitheatre. Rochford told him that if he crossed over 18th Street he would be arrested.

Defendant Neuhaus spoke with Rochford and told him he "represented a number of delegates" who wished to go to the Amphitheatre. Rochford told him no one would be permitted to walk through the line of Guardsmen but if he would call the delegates together transportation would be arranged to the convention.

Defendant Weiss, a delegate to the convention, testified that he joined the march and continued with it to the point where it was stopped. He stated that he advanced to the front of the marchers and at that point had a conversation with National Guard Colonel Donald G. Lapsley, who told him "the line of march was to the west;" Weiss replied that he was a delegate on his way to the Amphitheatre and intended to go there. Lapsley told him that if he went south of 18th Street he would be arrested. He walked south and was arrested.

Defendant Kempton, also a delegate, joined the march near Grant Park and continued on to 18th and Michigan. He too was told that if he went south of the "line" he would be arrested. He walked through the line and was placed under arrest.

Defendant Weiss, in a separate brief contends that he was arrested "solely for the crime of walking in a southerly direction after being told not to do so; there was absolutely no showing of any imminent present threat of hostility caused by his lone act of walking to the south." He argues too, that prior to walking to the south he sought to avail himself of Deputy Superintendent Rochford's offer of transportation to the convention but was advised by Colonel Lapsley that the offer had been withdrawn. In rebuttal Rochford testified that only he had authority to withdraw the offer and had not done so.

[6] Our review of the testimony leads us to conclude that the argument of defendant Weiss that when arrested he was in the act of walking to the convention alone, thus, in effect, completely disassociated from the other marchers, does not find support in the testimony. We conclude further that even assuming that when he sought to accept the previously extended offer of transportation to the Amphitheatre he was told it had been withdrawn, this fact did not give rise to a right to violate the lawful order not to proceed south on 18th Street. If reaching the Amphitheatre were in fact his intention, there were available means of achieving that goal without violating the police order.

[7] Defendants argue that the order to stop the marchers at 18th Street was not given because of imminent danger of violence if the march proceeded, but was given in furtherance of enforcing a "blanket prohibition against marches to the Amphitheatre." We have examined the portions of the record cited in support of this argument and although there can be little doubt that the city did intend to prohibit demonstrations at the Amphitheatre, it does not follow that it intended to prohibit this particular march for any reason other than the one given by Rochford and the other police officials. It should be noted that the record presents no issue of the validity of the ban on demonstrations at the Amphitheatre. We are here concerned only with what occurred at 18th and Michigan and having determined that the order not to proceed south of 18th Street was lawful, the sole remaining issue is whether, when defendants disobeyed the order, the other conditions requisite to sustain the judgment were present.

[8] The record shows that immediately prior to and at the time when defendants crossed the "line" and were arrested, rocks and firecrackers were being thrown, more than three people were committing these acts in the immediate vicinity, and there is ample basis in the record to show that these acts would cause substantial harm.

The testimony shows repeated announcement of the order, conversations between several of the defendants and various police officers, and obviously the defendants knew the order was that of a peace officer as required by the ordinance. There is no evidence that any of the defendants threw rocks or firecrackers or engaged in disorderly conduct, but it is not necessary for a conviction under section 193-1(d) to show that the defendant was one of the "three or more persons" committing acts of disorderly conduct. City of Chicago v. Fort (1970), 46 Ill.2d 12, 262 N.E.2d 473; City of Chicago v. Greene (1970), 47 Ill.2d 30, 264 N.E.2d 163.

[9] Defendants, in their brief, point out alleged inconsistencies in the testimony of the police officers with respect to what they term the "female defendants." We have examined the testimony and it supports a finding that these defendants were within hearing range of the dispersal order, unmistakably being given by a peace officer, and elected to cross the "line" knowing that it would result in their being arrested. We do not find the argument that no order of dispersal was given the "female defendants" persuasive.

Our examination of this record convinces us that the circumstances out of which these cases arose presented a situation where defendants' first amendment rights were required to yield to the compelling interest of the city to maintain peace and order. They elected to defy a lawful order and in so doing violated a valid ordinance. The judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

SCHAEFER, J., took no part in the consideration or decision of this case.

APPENDIX B

Chicago Municipal Code

193-1. A person commits disorderly conduct when he knowingly:

a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace; or

b) Does or makes any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence; or

c) Refuses or fails to cease and desist any peaceful conduct or activity likely to produce a breach of peace where there is an imminent threat of violence, and where the police have made all reasonable efforts to protect the otherwise peaceful conduct and activity, and have requested that said conduct and activity be stopped and explained the request if there be time; or

d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; or

e) Assembles with three or more persons for the purpose of using force or violence to disturb the public peace; or

f) Goes about begging or soliciting funds on the public ways, except as provided in Chapter 36, Sections 11 through 18; or

g) Appears in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity; or

h) Carries in a threatening or menacing manner, without authority of law, any pistol, revolver, dagger, razor, dangerous knife, stiletto, knuckles, slingshot, an object containing noxious or deleterious liquid, gas or substance or other dangerous weapon, or conceals said weapon on or about the person or vehicle; or

i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; or

j) Pickets or demonstrates on a public way within 150 feet of any church, temple, synagogue or other place of worship while services are being conducted and one-half hour before services are to be conducted and one-half hour after services have been concluded, provided that this subsection does not prohibit the peaceful picketing of any church, temple, synagogue or other place of worship involved in a labor dispute.

A person convicted of disorderly conduct shall be fined not less than $5.00 nor more than $500.00 for each offense.

SECTION 2. This ordinance shall take effect on and after ten days from the date of passage and publication.

AUG 10 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-19

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER AND ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-19.

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER AND ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION.

STATUTES AND ORDINANCES.

ILL. REV. STAT. 1967, ch. 38, par. 26-1:

26.1 (a) A person commits disorderly conduct when he knowingly:

(1) Does any act in such reasonable manner as to alarm or disturb another and to provoke a breach of the peace; . . .

MUNICIPAL CODE OF CHICAGO, ILLINOIS, SEC. 193-1:

193-1. A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace; or

. . .

(d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; . . .

A. L. I, MODEL PENAL CODE, Tent. Draft No. 13, 1961:

Section 2501. Disorderly Conduct; Riot.

. . .

(2) Failure of Disorderly Persons to Desist or Disperse Upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other official engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to desist or disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor. . . .

STATEMENT OF THE CASE.

The events which led to the arrest of petitioners occurred on the final evening of the 1968 Democratic National Convention, August 29, 1968. On that day, a crowd of some 3,000 persons, including petitioners, assembled in a downtown park. The convention's final session was being held at the Amphitheatre, about five miles southwest. Speakers in the park announced that the group would march to the Amphitheatre and demonstrate there, although the apparent leader, Dick Gregory, said that he was inviting the crowd to his house for dinner in another part of town.

The National Guard had been called out earlier in the week, and in the five days preceding petitioners' march, there had been notorious violent confrontations between demonstrators and police and guardsmen. In addition, in the spring of the year (following the assassination of Martin Luther King) there had been destructive riots in Negro and Puerto Rican communities. With this background in mind and with the knowledge that Negro residential areas lay between downtown and the Amphitheatre, General Dunn, the commander of the National Guard, told Gregory that petitioners' group could proceed south only to 18th Street and Michigan Avenue, where a final decision would be made whether the march could continue. The march began down Michigan Avenue at about 7:30 P. M.

Earlier in the day, about 4:00 P. M., a group of some 2,000 had begun a march southward on approximately the same route petitioners' group would later take. That group was stopped at 16th Street, and all but about 30 persons returned to the park. This small group continued, accom-

panied by police officers, south on State Street. Along this route the marchers were heckled by Negro residents and finally, at 39th, a scene of pushing and threats occurred between the predominantly white marchers and the Negro residents. The incidents finally ended when the marchers were escorted out of the area by the police at about 6:00 P. M.

At about 8:30 P. M. the group in which petitioners marched reached 18th Street, where a National Guard line had been set up. General Dunn and Deputy Superintendent Rochford, the ranking police officer, were already present at 18th Street. There, officers who had accompanied the earlier march informed them of the 39th Street incidents. Secret Service Agent Boggs was also present at 18th Street. (He was concerned with the safety of the presidential candidate at the Amphitheatre. There, there was no place for 3,000 marchers—the street before the Amphitheatre was closed during convention sessions and the only other nearby open areas were parking lots on private property.) After a conference among these officials, it was decided it would be unsafe to let the march continue, taking into consideration the character of the neighborhood ahead, the confrontations that afternoon and the physical facilities of the Amphitheatre.

Gregory and other march leaders conferred with Rochford and Dunn at 18th Street and were informed of the decision.

Announcements were given as the march reached 18th Street and during the 45 to 75 minutes the crowd remained there. A National Guardsman standing on a jeep continuously announced over a bull horn that the marchers must proceed north or west, but could not go south. (The intersection was barricaded along a northeast-southwest line, so that only the streets to the north and west were

open.) In addition to the public announcement, individual announcements were given by guardsmen or arresting officers before and at the time of each petitioner's arrest that they "could not proceed south," that they were "free to leave," or that "the line of march was to the north or west."

Until they arrived at 18th Street, the marchers had been generally orderly, marching in formation on the sidewalk. However, disorders began occurring after arrival when the group learned they could not proceed farther south. Although the group initially halted some yards from the corner, the marchers gradually worked their way forward until they were toe to toe and face to face with the guardsmen at the barricade. In contrast to the original manner of their march, at 18th Street the crowd spread out across the intersection, covering Michigan Avenue "from building line to building line."

It was after the march had halted and before petitioners' arrests commenced that the violence began. Members of the crowd began throwing rocks and firecrackers at the guardsmen, and some of the marchers taunted the guardsmen and urged the others to disobey the command to go west. At least one marcher called upon the crowd to charge the guard line, shouting "tonight we die here." There was no evidence that the petitioners, who were within the crowd, participated in the violence.

It should be noted that on the question of the crowd's violence, most (but not all) respondent's witnesses testified they heard and saw the firecrackers, rocks, and exhortations to violence. However, most (but not all) petitioners and petitioners' witnesses testified they saw or heard none of these events prior to petitioners' arrests.

The announcements continued during the violence. It was at this time that petitioners, some individually and some in groups, ignoring the announcements to disperse, walked

southward across the National Guard line. Each was again reminded by a police officer or guardsmen of the order of dispersal and some were told they were "free to leave," but if they persisted in marching south, they would be arrested. Upon refusing to leave, petitioners were arrested.

Following the arrest of petitioners and several others, the arrests halted, but the tension escalated. When the crowd surged upon the line of guardsmen, the crowd had to be dispersed by the National Guard using tear gas.

Petitioners were charged with, and after trial to the court, convicted of failing to obey a lawful order to disperse when three or more persons were committing acts of disorderly conduct—in violation of section 193-1(d) of the Municipal Code of Chicago, Illinois.

REASONS FOR DENYING THE WRIT.

I.

THE ORDER HALTING THE MARCH AND THE LATER ORDER DISPERSING THE CROWD WERE NOT ARBITRARY.

The petitioners' first contention is not one of nationwide importance, revolving around the facts in this particular case. An examination of those facts discloses that, under the circumstances, the arrests were lawful.

The crowd received two separate orders—first, not to proceed past 18th Street, and, second, when violence began to occur in response to that order, to disperse.

A.

Halting the March Was Justified Because There Was Reason to Believe Disorder Would Ensue if the March Continued Southward.

Petitioners were not convicted of disobeying the order halting the march at 18th Street. Rather, they were convicted of failing to disperse when "three or more persons" in the crowd assembled at 18th Street "were committing acts of disorderly conduct in the immediate vicinity."

Although the initial order closing the street forms no part of the charge of which petitioners were convicted, it is worth noting that in the face of imminent danger of violence, civil authorities are justified in stopping assemblies which, in absence of the threat of violence, would be otherwise lawful.

It is no novel premise that violence and free expres-

sion are incompatible. *Cox* v. *Louisiana,* 379 U. S. 559, 573-4 (1965). When experience has shown that a course of conduct has in the immediate past led to violence, courts may enjoin, or the police may stop, a repetition of that conduct. Even such a basic right as freedom to picket may be enjoined, as it was in *Milk Wagon Drivers* v. *Meadowmoor Dairies,* 312 U. S. 287 (1940), when a continuance of picketing would surely have led to further violence.

The Illinois Supreme Court examined the testimony of the officers accompanying the 4 P. M. march (held immediately prior to petitioners' march) and that of those familiar with the neighborhood on the proposed route of march, and recognizing that violent confrontations occurred earlier in the week, concluded that the decision to halt the march at 18th Street was well supported. With the propensity for further violence being obvious, the Illinois Supreme Court's decision is fully in accord with *Meadowmoor.*

Other courts have reached the same conclusion in similar circumstances. In *People* v. *Uptgraft,* 8 Cal. App. 3rd Supp. 1, 87 Cal. Rptr. 459 (1970), cert. den. 400 U. S. 911 and *People* v. *Hairston,* 8 Cal. App. 3rd Supp. 19, 87 Cal. Rptr. 470 (1971) cert. den. 400 U. S. 952, authorities at the San Fernando Valley State College were held to have lawfully banned a non-violent student assembly. The holding was not extraordinary in the light of the school's experience with earlier gatherings, which in the preceding two months and especially the previous two days, ended in destructive riots.

Thus no substantial federal question is raised by the halting of the march in a situation where experience indicated violence was likely if the march continued.

B.

The Order Dispersing the Crowd Was Necessary to Prevent a Violent Situation from Becoming Worse.

The apprehension of violence became reality, not from confrontation in Negro neighborhoods, as the authorities halting the march feared, but from the marchers, themselves. A march that began peacefully degenerated into taunts, exhortation to violence and throwing of rocks and firecrackers when the marchers' goal of reaching the Amphitheatre was frustrated. These disorders necessitated the order of dispersal. Because they did not participate in these activities, petitioners wrongly assert that they therefore did no wrong in failing to heed the order of dispersal.

It is essentially petitioners' claim that Section 193-1(d) of the Municipal Code of Chicago, Illinois permits conviction for innocent conduct. But this conveniently assumes the very question at issue: whether there is a "right" to be present where acts likely to cause substantial harm are taking place, or, more functionally, whether any direction to disperse is valid under the Constitution.

Petitioners suggest that the controlling case in this context is *Gregory* v. *City of Chicago,* 394 U. S. 111 (1969). That case, however, is not amenable to such a reading. Mr. Chief Justice Warren described the problem there concisely and clearly:

> "The opinion of the Supreme Court of Illinois suggests that petitioners were convicted not for the manner in which they conducted their march but rather for their refusal to disperse when requested to do so by Chicago police. See 39 Ill. 2d 47, 60, 233 N. E. 2d 422, 429 (1968). However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer." 394 U. S. 111, 112.

A footnote to the opinion observes that "neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police order." That, however, is precisely the definition contained in section 193-1(d). *Gregory*, then, revolved about an improper charge and had nothing to say respecting "innocent conduct."

This Court recently has offered guidance as to whether an order to disperse may be valid. In *Bachellar* v. *Maryland*, 397 U. S. 564 (1970), convictions of anti-war protestors were reversed because they may have resulted from bystander disagreement with their views on the Vietnam war. But the Court distinguished this constitutionally invalid result from others that are free from such infirmity, commenting that

> ". . . petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. See, e.g, *Cox* v. *Louisiana* (I), at 544-555; *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90-91 (1965)" 397 U. S. at 571.

It is difficult to find a distinction of constitutional dimension between an order to move on for obstruction and an order to move on in the presence of violence. As Mr. Justice Walter V. Schaefer of the Illinois Supreme Court noted, in an opinion upholding the ordinance:

> "In order to prevent public disturbances from escalating it is often necessary for the police to order persons congregated in the immediate vicinity of a disorder to disperse. We see no constitutional infirmity in a narrowly drawn ordinance which permits the police to arrest those who fail to comply with such an order, whether they are spectators or participants in the underlying disturbance." *Chicago* v. *Fort*, 46 Ill. 2d 12, 15 (1970).

Neither the ordinance nor the judgment are unique. The Model Penal Code contains a similar provision (Section 250.1(2), Tent. Draft No. 13, 1961). California Penal Code, section 409, is remarkably similar. It states "Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse . . . is guilty of a misdemeanor." The California courts have sustained this section repeatedly. *In re Bacon,* 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966); *Hoffman* v. *Municipal Court,* 3 Cal. App. 3rd 621, 83 Cal. Rptr. 747 (1970); *People* v. *Uptgraft, supra; People* v. *Hairston, supra; People* v. *Cipriani,* 18 Cal. App. 3rd 299, 95 Cal. Rptr. 722 (1971).

Convictions for failure to obey an order to disperse in the presence of violence have been upheld in other states. See, *e.g., Cassidy* v. *Ceci,* 320 F. Supp. 223 (E. D. Wis. 1971) (three-judge court); *Feeley* v. *District of Columbia* (D. C. Ct. App. 1966), 220 A. 2d 325, vacated on other grounds (D. C. Cir. 1967), 387 F. 2d 216; *People* v. *Scott,* 295 N. Y. S. 2d 724 (1968); *Heard* v. *Rizzo,* 281 F. Supp. 720 (E. D. Pa., 1968) (three-judge court), aff'd 392 U. S. 646; *Rollins* v. *Shannon,* 292 F. Supp. 580 (E. D. Mo. 1968) (three-judge court), vacated on other grounds 401 U. S. 988; see also cases cited at 65 A. L. R. 2d 1152.

II.

SECTION 193-1(d) IS NEITHER VAGUE NOR OVERBROAD; ON ITS FACE AND AS CONSTRUED BY THE ILLINOIS SUPREME COURT, IT DOES NOT PERMIT AN ORDER OF DISPERSAL ABSENT OF AN IMMINENT THREAT OF VIOLENCE.

In *Colten* v. *Kentucky*, ... U. S. ....., 40 L. W. 4705 (June 13, 1972), this Court upheld against an attack of vagueness and overbreadth a statute defining disorderly conduct as acts which "cause public inconvenience, annoyance or alarm," a definition not even as definite as that of section 193-1(d): "acts . . . likely to cause substantial harm, or serious inconvenience, annoyance or alarm." The *Colten* statute was upheld because of the narrowing construction the Kentucky Supreme Court had given it in the proceedings below. Similarly, in measuring the compass of 193-1(d), a court is not "relegated . . . to the words of the ordinance" *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971), but has the benefit of the gloss given it in many prior Illinois Supreme Court cases. *Chicago* v. *Fort*, 46 Ill. 2d 12, 262 N. E. 2d 473 (1970); *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 263 N. E. 2d 41 (1970); and *Chicago* v. *Greene*, 47 Ill. 2d 30, 264 N. E. 2d 163 (1970), cert. den. 402 U. S. 996.

The particular element of overbreadth asserted by petitioners is that the ordinance requires obedience to an order that may be given on the whim of a police officer. Thus, so the argument goes, the ordinance allows an order of dispersal to be given for protected, if grating, First Amendment activities.

This argument ignores the fact that, as interpreted, an order of dispersal may only be given if there is violence or an imminent threat of violence. In its first case involving section 193-1(d), the Illinois Supreme Court held that the term "disorderly conduct" appearing therein incorpo-

rates by reference the elements of disorderly conduct contained in section 193-1(a) of the Municipal Code of Chicago. *Chicago* v. *Fort*, 46 Ill. 2d 12, at 14, 262 N. E. 2d 473 at 475. The court further noted that section 193-1(a) was similar in terms to the state disorderly conduct statute (Ill. Rev. Stat. 1967, ch. 38, par. 26-1(a)). In *People* v. *Raby*, 40 Ill. 2d 392, 397, 240 N. E. 2d 595, 598 (1968), cited in *Fort*, the court unequivocally stated that, "Under no circumstances would the statute allow persons to be punished merely for peacefully expressing unpopular views."

Similarly, in the second case in which it interpreted section 193-1(d)—a case in which the defendants were engaged in First Amendment activities—the Illinois Supreme Court observed that the arrests were permissible because "[t]he situation at the moment was one dangerously close to greater disorder." *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 217, 263 N. E. 2d 41, ... (1970).

In *Grayned* v. *Rockford*, ... U. S. ....., 40 L. W. 4881, 4883 (June 26, 1972), this Court recognized that the Illinois Supreme Court clearly distinguishes an arrest for disorderly conduct from an arrest for failure to disperse in the face of imminent violence:

> "[I]n *Chicago* v. *Meyer*, 44 Ill. [2d] 1, 4 (1969), [cert. den. 397 U. S. 1024, reh. den. 398 U. S. 915], and *Chicago* v. *Gregory*, 39 Ill. 2d 47 (1968), reversed on other grounds, 394 U. S. 111 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a 'diversion tending to disturb the peace,' and held that it permitted conviction only where there was '*imminent threat of violence.*' (Emphasis supplied.)"

The defendant in *Meyer* was arrested when the street-corner forum he was conducting was about to erupt into a fist-fight. The record showed that "there was some

violence and a threat of greater violence." 44 Ill. 2d at 6. Meyer was charged both with being disorderly and with failure to disperse upon the order of police. The court reversed the conviction for disorderly conduct, because it held Meyer was not disorderly or violent in giving his speech. However, even absent violence on Meyer's part, the court sustained the conviction of failing to obey the order of dispersal. The arrest was permissible because the conduct of the crowd was such that it was necessary to disperse those present in order to correct a seriously deteriorating situation.

It is clear, then, that as interpreted, the ordinance does not suffer from overbreadth. It permits an order of dispersal to be given only in the presence of the threat of violence, or, as in the present case, where acts of violence are already occuring.

CONCLUSION.

For the foregoing reasons, it is respectfully suggested that the petition fails to raise a substantial federal question nor any doubt as to the conformity of the Illinois Supreme Court's decision with prior decisions of this Court or of other courts construing similar statutes. Accordingly, the petition for writ of certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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August 10, 1972.

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No. 72-19

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER and ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

REPLY OF PETITIONERS TO BRIEF OF CITY OF CHICAGO IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-19

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER and ELLIS BOAL,

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Respondent.

REPLY OF PETITIONERS TO BRIEF OF CITY OF CHICAGO IN OPPOSITION

I.

THE CITY OFFERS NO LEGAL JUSTIFICATION FOR HALTING THE MARCH.

The City of Chicago Brief in Opposition states that there were two separate orders given. First, not to proceed south and second, to disperse. Neither the record nor the Opinion of the Illinois Supreme Court supports the City's

assertion that any order to disperse was given. The Supreme Court Opinion went to great lengths to convert the order not to proceed south into an order to disperse. It is precisely this construction that the Petitioners are attacking. The Illinois Supreme Court Opinion states:

> "The first question to be determined is whether the order not to proceed south of the 18th Street was an order of dispersal under Section 193-1(d). . . . The clear intent of this order was that the march would be dispersed if and as it attempted to move south and it was an order of dispersal within the meaning of section 193-1(d)." (Pet. Cert. 7a)

Apparently the City recognizes that this construction by the Illinois Supreme Court is not satisfactory, as even the City must concede that an order not to proceed south cannot be construed as an order to disperse. Therefore, the City asserts erroneously that an order to disperse was given.

A.

In This Case It Is Academic To Consider Whether An Order to Disperse Might Have Been Appropriate When No Such Order Was Given.

By predicating their argument on the false premises that an order to disperse was given, the City proceeds to reason that, therefore, the Petitioners were not convicted of disobeying the order stopping the march at 18th Street. Nevertheless the City feels it necessary to justify the closing of the street and the stopping of the march. This is done by relying on cases which state that in certain circumstances, free speech activities can be terminated or prohibited. This general proposition is not an issue in this case. What the City does not assert is

any legal basis under Illinois law for the action of the City Police and National Guard in stopping the march. The cases cited either state the proposition that as a matter of principle where there is lawful authority for the same First Amendment activities may be regulated; *Cox* v. *Louisiana,* 379 U.S. 559 (1965); or concern the construction of an unlawful assembly statute as in *People* v. *Uptgraft,* 8 Cal. App. 3rd Supp. 1, 87 Cal. Rptr. 459 (1970) and *People* v. *Hairston,* 8 Cal. App. 3rd Supp. 19, 87 Cal. Rptr. 470 (1971).

The case of *Milk Wagon Drivers* v. *Meadowmoor Dairies,* 312 U.S. 287 (1941), is hardly in point, since that case involved the right of a Court after judicial determination to restrict picketing under circumstances where violence had, or might occur. This judicial authority can hardly be asserted by peace officers acting without any statutory authority and without any opportunity for hearing by the parties affected. No person can reasonably be expected to understand Section 193-1(d) as giving peace officers such authority, particularly when as here it is conceded that " — as of the time when it [the order not to proceed south] was given, when admittedly the march continued to be peaceful and orderly. . ." (Pet. Cert. 7a). Yet the Illinois Supreme Court goes on to hold that the authority for the termination of the march is precisely Section 193-1(d) which requires as an element of the offense that there be acts of disorderly conduct in the vicinity authorizing a dispersal order. Such construction can hardly comport with the holdings of this Court in *Gregory* v. *Chicago,* 394 U.S. 111 (1969), *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960) and *Bachellar* v. *Maryland,* 397 U.S. 564 (1970).

B.

Construing Section 193-1(d) As An Ordinance Permitting Peace Officers to Terminate Peaceful Assemblies Renders the Ordinance Overbroad.

Part I.B. of the City's argument attempts to justify the result in this case by stating that a failure to disperse where violence is being committed is punishable and that, in fact, this is why the Defendants were punished. However, the Opinion of the Illinois Supreme Court and the record in this case, demonstrates conclusively that the Petitioners were punished not because they failed to disperse under circumstances where three or more persons were creating acts of disorderly conduct, but that they were arrested for marching south. This is the whole point of the National Guard line opening to allow persons to march through a corridor to be arrested. Obviously under the dynamics of the situation, the police, Guardsmen and demonstrators all recognized that Petitioners were arrested for the act of marching south. This is what was announced to the demonstrators; namely, anyone marching south would be arrested. Perhaps such conduct by Petitioners violated some Illinois statute or City of Chicago ordinance. Perhaps the action of the Petitioners in marching south could have been a violation of Section 11-33(a) of the Chicago Municipal Code[1] relating to resisting or obstructing the performance of a peace officer of an authorized act within his official capacity. See, for example, the construction of the Illinois Supreme Court with respect to the predecessor of Section 11-33(a) in *Chicago* v. *Meyer*,

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[1] The text of this ordinance is set forth in the Petition for Writ of Certiorari, footnote 2, page 7. Some of the Petitioners were initially charged with a violation of this ordinance, but these charges were dropped prior to trial.

44 Ill. 2d 1, 253 N.E. 2d 400 (1969), cert. den. 397 U.S. 1024, reh. den. 398 U.S. 915. Perhaps the conduct of marching south might have violated 193-1(c) of the Chicago Municipal Code (Pet. Cert. 13a). However, the City deliberately elected not to prosecute under these Chicago Ordinances, but specifically elected to prosecute under Section 193-1 (d), which has no application to the facts or circumstances for which the Petitioners were arrested. Therefore, *Gregory* v. *Chicago,* 394 U.S. 111 (1969), requires reversal here. The case of *Bachellar* v. *Maryland,* 397 U.S. 564 (1970) cited by the City (Rsp. Br. 10) certainly supports the Petitioners' position and not the City's. There the record did not clearly show that the Defendants' conviction was not based solely on their expression of unpopular views. Here the record shows the Petitioners were convicted solely because they persisted in walking to the International Amphitheatre.

The City's citation of the Model Penal Code and ordinances and statutes of other jurisdictions which have been held facially valid, is hardly in point as it is clear from the facts in this case that the Defendants were arrested and convicted for something which has no relation whatsoever to the ordinance under which they were tried and convicted. However, it is worth noting that most of the cases cited by the City are cases involving unlawful assembly, an element which is not found in the Ordinance in question.

II.

AS CONSTRUED BY THE ILLINOIS SUPREME COURT IN THIS CASE SECTION 193-1(d) IS VAGUE AND OVERBROAD ON ITS FACE.

Petitioners agree with the City that the construction of the Illinois Supreme Court of its ordinances is im-

portant to determining whether the ordinance is facially invalid for vagueness or overbreadth. In addition to the previous cases in which the ordinance was construed by the Illinois Supreme Court, this Court must also consider the instant case as being part of the construction. In the instant case it is clear that the Illinois Supreme Court construes this ordinance to apply to violations of police lines. Nowhere in the ordinance is there anything which remotely would put a person of reasonable intelligence on notice that he can be guilty of an offense under 193-1 (d) for violating a police line. While *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 263 N.E. 2d 41 (1970), did peripherally involve a peace demonstration, the specific circumstance of the arrest and conviction differ markedly from that in the instant case. In any event, the validity of the ordinance was not an issue in the *Jacobs* case. The other two cases in which the validity of the ordinance was challenged, *Chicago* v. *Fort*, 46 Ill. 2d 12, 262 N.E. 2d 473 (1970) and *Chicago* v. *Greene*, 47 Ill. 2d 30, 264 N.E. 2d 163 (1970), cert. den. 402 U.S. 996, did not involve any First Amendment activity.

In any case, regardless of the construction in the other cases, the Illinois Supreme Court has amply illustrated in this case, it is prepared to construe Section 193-1(d) in a way which makes it possible to punish peaceful conduct wholly unrelated to any violence or threat of violence. Thus, in the context of this case, whatever violence may have been committed in the vicinity, had nothing to do with the police order to move the march west or back north. Not only is this not an order of dispersal, it is an order which could not be intended to have an effect on terminating whatever violence might have been existing or might be threatened in the vicinity.

If the ordinance is to be given a reasonable and narrow construction, the order of dispersal must be reasonably related to terminating the "disorderly conduct", *i.e.*, violence mentioned in the ordinance. The Illinois Supreme Court Opinion in this case indicates that it is prepared to punish innocent, peaceful persons merely because there is a happenstance that nearby some violent activity is occurring. Certainly, such a construction renders the ordinance overbroad. It is preposterous to state that the statute as construed by the Illinois Supreme Court does not permit an order of dispersal absent in imminent threat of violence as, in fact, the record in this case demonstrates that that is precisely the way the Illinois Supreme Court construed the ordinance; namely, to punish innocent conduct without an imminent threat of violence or with respect to any violence related to the activities of the parties involved. See particularly the Illinois Supreme Court's discussion of the arrest and conviction of Petitioner Weiss (Pet. Cert. 10a-11a). It is clear from the facts that the Petitioners were separating themselves from the group by marching south and being arrested. Ironically they have been convicted for failing to disperse when, in fact, they were the only people in the group that were dispersing. We have already noted above that the Illinois Supreme Court interpretation of this ordinance permits an order of dispersal to be given when the conduct of the assembled group is peaceful and orderly. This construction of the Illinois Supreme Court of its ordinance renders it both overbroad and void for vagueness.

For the above reasons and the reasons stated in the Petition for Writ of Certiorari, this Court should grant Certiorari.

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